

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD WILSON,

Plaintiff,

No. Civ.S-04-690 DFL JFM

v.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

NORBRECK LLC dba JOHNNY
CARINOS et al.,

Defendants.

_____/

This matter came on for trial by the court, sitting without a jury, on August 1, 2006. Having heard oral testimony and received documentary evidence, the court now makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I.

Wilson is a disabled person who brings claims for damages and injunctive relief under the Americans with Disabilities Act (ADA") and the Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code §§ 51 et seq..¹ Defendants own and operate the Johnny

¹ Plaintiff's conclusions of law address only the Unruh Civil Rights Act. The court treats this as an election of

1 Carino's restaurant in Fairfield, California. Johnny Carino's is
2 a place of public accommodation under the relevant statutes.
3 Wilson's claims are based upon his patronage of the restaurant on
4 several occasions in 2003 and 2004.

5 Title III of the ADA provides that "No individual shall be
6 discriminated against on the basis of disability in the full and
7 equal enjoyment of the goods, services, facilities, privileges,
8 advantages, or accommodations of any place of public
9 accommodation by any person who owns, leases (or leases to), or
10 operates a place of public accommodation." 42 U.S.C. § 12182(a).
11 The Unruh Act incorporates the ADA. Cal. Civ. Code § 51(f).

12 Under the ADA, the Department of Justice is instructed to
13 issue regulations providing substantive standards for public
14 facilities subject to the ADA. These regulations are known as
15 the ADAAG (ADA Accessibility Guidelines) and are found at 28
16 C.F.R. Part 36, Appendix A. All parties agree that the ADAAG
17 standards define whether an architectural or other feature of a
18 facility is a "barrier" that discriminates against disabled
19 persons in violation of the ADA. The parties further agree that
20 the California Building Code ("CBC"), Cal. Code of Regs., Title
21 24, provides substantive standards for violations of the Unruh
22 Act in addition to the ADAAG.

23 The court has federal question jurisdiction of the ADA claim
24 and supplemental jurisdiction of the state law claim.

25 _____
26 damages under the Unruh Act as opposed to the Disabled Persons
Act, Cal. Civ. Code § 54.1(a)(1).

1 The parties stipulated to the following facts in the Pre-
2 trial Order:

3 1. Wilson is a sixty-nine year-old married male who has
4 been disabled since 1993;

5 2. Wilson has severe degenerative joint disease in his
6 neck, legs, shoulder, and spine. He has an irregular heartbeat,
7 multi-joint arthritis, post-traumatic arthritis, peripheral
8 neuropathy, slight foot drop, and limited range of motion of
9 upper extremities.

10 3. Wilson uses a walking cane or wheelchair (or both) when
11 traveling in public.

12 4. Wilson drives a van without a wheelchair lift.

13 5. Wilson has a disabled placard, which has been issued by
14 the State of California, Department of Motor Vehicles.

15 6. Two days after Wilson's first visit, he hand wrote a
16 letter to the restaurant detailing the barriers he remembered
17 encountering.

18 7. The restaurant is a sales establishment (open to the
19 public) where patrons (i.e. - the public) are invited to dine.

20 8. Defendant FairBreck, LLC is the owner and lessor of the
21 land and the facility located at 1640 Gateway Court, Fairfield,
22 CA 94533.

23 9. Defendant NorBreck, LLC is the operator and lessee of
24 the restaurant.

25 10. Defendants have never applied for, nor received, a
26 hardship exemption for the restaurant.

1 11. Defendant NorBreck, LLC provides goods, services,
2 facilities, privileges, advantages, and accommodations at the
3 restaurant.

4 12. Construction of the restaurant was completed on
5 September 16, 2002.

6 13. Defendant NorBreck, LLC has been the operator of the
7 restaurant located at 1640 Gateway Court, Fairfield, CA 94533
8 since it opened.

9 Following the summary judgment motions, the following issues
10 remained for trial:

11 a. Whether sufficient accessible seating is available in
12 the bar area;

13 b. Whether the toilet paper dispenser violates the
14 California Building Code ("CBC") by not being within 12" of the
15 front edge of the toilet seat;

16 c. Whether the wastebaskets encroach on the clear floor
17 space under the sink;

18 d. Whether the entrance door pressure exceeds 5 pounds of
19 pressure;

20 e. Whether the bar area is accessible; and

21 f. Whether the restaurant has a sufficient number of fixed
22 tables with the necessary 19" knee clearance.

23 II.

24 A. Placement of Toilet Paper Dispenser

25 At the close of Wilson's case in chief, Norbreck moved for
26 judgment pursuant to Fed. Rule Civ. Pro. 52(c) as to issue (b),

1 placement of the toilet paper dispenser. Wilson claims that the
2 location of the toilet paper dispenser violates ADAAG 4.16.6
3 because it is not "within reach" and CBC § 1115B.9.3 because it
4 is not within 12 inches of the front edge of the toilet seat.
5 The Court granted defendants' motion on the basis that the
6 evidence did not show the exact placement of the toilet paper
7 dispenser in relation to the front edge of the toilet seat.
8 Because no evidence was offered by plaintiff as to the exact
9 distance between the dispenser and the front edge of the toilet,
10 insufficient evidence was shown to find a violation of the CBC.
11 As to the ADAAG, the court could not infer that the toilet paper
12 dispenser was "out of reach" on the basis of Wilson's testimony,
13 in which he explained that, in fact, he could reach the dispenser
14 by leaning forward. Moreover, it should be noted that while
15 Wilson uses a wheelchair much of the time, he is able to walk
16 considerable distances and to stand. He is not paraplegic. The
17 placement of the toilet paper dispenser was not a barrier to him.
18 Therefore, as to this claim under the Unruh Act and the ADA,
19 Wilson failed to carry his burden of proof.

20 B. Accessible Seating in Bar and Restaurant

21 Plaintiff claims that the accessible "dining seating" in the
22 bar area is inadequate because five percent of the seating must
23 be adequate under ADAAG 5.1 and CBC § 1104B.5.4. He claims that
24 the one accessible seat at the bar lacks adequate knee clearance
25 and counter space. He also claims that the other tables in the
26 bar area lack accessible seating because the knee clearance is

1 inadequate. The defense expert, Kim Blackseth, testified that,
2 according to his measurements, the knee clearance in the nearby
3 tables satisfied the applicable ADAAG and CBC minimums.

4 This particular dispute turns on (1) which tables should be
5 considered part of the bar seating area, and (2) whether the
6 tables provide accessible seating if the disabled person sits in
7 between the table legs, centered on one side of the table. As to
8 the first issue, the court finds that plaintiff has not shown
9 that the "bar area" is a discrete eating area limited to the
10 seats at the actual bar and the booths across from the bar.
11 Rather, the seating includes the tables in the adjoining space
12 and in the so-called "fireplace room" which is not distinct or
13 closed off from the bar.

14 As to the second issue, the court finds that the knee space
15 clearance complies with all applicable regulations concerning
16 height, width and depth under ADAAG 4.32.3 and CBC § 1122B.3. A
17 disabled person may sit on one side of the table in between the
18 table supports. Apparently plaintiff's expert did not consider
19 this possibility and did not make his own measurements of this
20 part of the table. For this reason, on the very eve of trial,
21 Wilson himself went to the restaurant to measure the tables. His
22 measurements differ from those taken by the defense expert and
23 would suggest inadequate knee space. However, the plaintiff
24 admitted that he had an attack of neuropathy while attempting the
25 measurement. Further, he used an inexact expandable ruler to
26 make the measurement. It is notable that plaintiff's expert did

1 not make a measurement of the space between the supports but only
2 measured the space from the support to the end of the table.
3 Given that both parties consider that an expert should make such
4 measurements, and given that the defense expert made this precise
5 measurement as part of his examination of the facility, and for
6 the further reasons noted above, the court finds that Blackseth's
7 measurement is the more reliable. Therefore, even if the one
8 accessible seat at the bar is not counted, there are numerous
9 accessible places at the tables in the immediately adjoining
10 space, including the fireplace area, such that the 5% requirement
11 is easily met at what can fairly be described as the "bar area."
12 Accordingly, plaintiff fails to show by a preponderance of the
13 evidence that there was inadequate accessible seating at the bar
14 area.

15 The court's finding that the non-booth tables provide
16 accessible seating, in compliance with applicable regulations,
17 also addresses plaintiff's claim that the restaurant as a whole
18 lacks sufficient accessible seating. Given that the tables
19 provide accessible seating, the restaurant as a whole meets the
20 5% requirement for accessible seating.

21 C. Encroachment by Wastebaskets

22 Wilson asserts that the two wicker wastebaskets in the men's
23 restroom obstructed his access to the sinks in violation of ADAAG
24 4.19.2 and CBC § 1115B.2.1.1. However, his testimony in this
25 respect was imprecise as to which visit he encountered the
26 wastebaskets and their exact placement and size. He was unable

1 to say whether the smaller version of the wastebasket was in
2 violation of the applicable codes. Given this imprecision, the
3 court finds that plaintiff has failed to establish a violation by
4 a preponderance of the evidence.

5 Moreover, the wastebaskets are light in weight. The defense
6 expert, himself a disabled person in a motorized wheelchair,
7 credibly testified that the wastebaskets present no barrier to a
8 disabled person. Accordingly, the court finds that the waste-
9 baskets are easily moved to provide any needed access to the
10 sinks. If the wastebaskets are in the way, which has not been
11 established, the vast majority of disabled persons, including
12 Wilson, could with little effort slide them a few inches to the
13 side. For all of these reasons, the court finds that the
14 wastebaskets were not a barrier or impediment to plaintiff and
15 did not violate the applicable code sections. Further, and for
16 the same reasons, the court rejects plaintiff's suggestion that
17 the wastebaskets constitute a discriminatory "policy," if not a
18 barrier.

19 D. Entrance Door Pressure

20 Wilson claims that the entrance door pressure violates ADAAG
21 4.13.11 and CBC § 1133B.2.5 because it requires more than five
22 pounds of force to open.

23 There are two issues here. The first issue is one of law:
24 what is the applicable upper limit on door pressure,
25 specifically, is it 5 pounds or 8 pounds? The second issue is
26 one of fact: did the door pressure present a barrier to plaintiff

1 Wilson.

2 The ADAAG does not specify a particular pressure for
3 exterior doors. However, state law does specify a maximum
4 pressure. The 1999 standard prescribes a maximum pressure of 8.5
5 pounds. The 2001 CBC lowered the maximum to 5 pounds. Because
6 the building permit was issued and plans approved prior to the
7 effective date of the 2001 CBC (November 2002), the court finds
8 that the 8.5 standard is controlling for purposes of state law.

9 It was the policy of defendants to maintain the door
10 pressure at 5 pounds of pressure. However, the evidence
11 indicates that the door pressure varied during the relevant time
12 period from 5 to 8 pounds.

13 Plaintiff's testimony on the door pressure during his
14 particular visits was imprecise. Based on his testimony, the
15 court could not find that the front door pressure exceeded 5
16 pounds on any identified visit. For this reason alone, the claim
17 fails.

18 The court finds further that at all relevant times the
19 exterior door pressure varied from 5 to 8 pounds and therefore
20 complied with the applicable state standard. As to the federal
21 standard, the court further finds that plaintiff Wilson's
22 disability is not so severe that a door pressure in this range
23 presents a barrier to him. Finally, the court rejects plaintiff's
24 claim that a door pressure over 5 pounds constitutes a
25 "discriminatory policy." In fact, defendants' policy is to
26 attempt to maintain the door pressure at 5 pounds.

1 E. Accessibility of Bar Area

2 To the extent that this claim presents an issue distinct
3 from bar seating, it fails. There is one accessible seat at the
4 bar with a lowered counter. The measurements of the knee
5 clearance, counter length, and counter height comply with CBC §
6 1104.5(4). The concrete curb has been removed. Neither the CBC
7 nor the ADAAG require seating for two at the bar itself.
8 Finally, the ADAAG requires either an accessible counter of 60"
9 or accessible tables in the same area. The latter requirement is
10 met as explained in section II(B).

11 For these reasons, the court finds that the bar itself is
12 accessible.

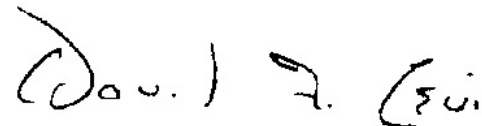
13 III.

14 For the above stated reasons, the court find that plaintiff
15 Wilson has failed to prove violations of the ADA or the Unruh
16 Civil Rights Act.

17 Judgment shall enter for defendants.

18 IT IS SO ORDERED.

19 Dated: 9/14/2006

20
21 

22 DAVID F. LEVI
23 United States District Judge
24
25
26